Supreme Court, U.S.
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No. 97-307

In The

Supreme Court of the United States

October Term, 1996

OSRAM SYLVANIA PRODUCTS, INC.,

Petitioner,

vs.

CHARLES T. VON DER AHE and
CHROMA LIGHTING,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September 18, 1997

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PARTIES TO THE PROCEEDING

Respondent Charles Von Der Ahe did business as "Chroma Lighting" for a period of time and later incorporated Chroma Lighting as a California corporation. The Respondents are collectively referred to herein as "Von Der Ahe." The action was brought against Petitioner, GTE Products Corporation, a Delaware corporation, and Sylvania Lighting Services Corporation, a Delaware Corporation. Sylvania Lighting Services has been dismissed and is not a party to this Petition. Contrary to the statement in Petitioner's Rule 29.1 listing, GTE Products Corporation has never been dismissed as a defendant. Both the published opinion (the "Opinion") and the unpublished Memorandum Opinion ("Memorandum"), as well as the District Court's Judgment, all of which are reprinted in the Appendix to the Petition, contain the correct caption. GTE Products' counsel, without seeking or obtaining leave of court, simply changed the caption on pleadings it filed to reflect what it says was "merely a name change."*

RULE 29.1 LISTING

Pursuant to Rule 29.1 Respondents hereby state that:

Respondent Chroma Lighting is a closely held California corporation that has issued no shares to the public.

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* In an attempt to avoid confusion, Respondents will refer to the Petitioner as either "Petitioner" or "Sylvania" hereinafter.

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STATEMENT OF THE CASE

The Petition is a thinly veiled attempt to invite this Court to rewrite the Robinson-Patman Antidiscrimination Act, 15 U.S.C. § 13(a) (1936) ("Robinson-Patman" or "RPA"), and to summarily reverse six decades of well-established Robinson-Patman jurisprudence.

In order to achieve its desired result, Sylvania attempts to create a conflict among the Circuits which simply does not exist. No Circuit espouses the rule that Sylvania urges this Court adopt.

The Petition also attempts to camouflage the fact that Sylvania was not precluded by the District Court (Judge William D. Keller) from introducing evidence in an attempt to establish that there was "no injury to competition." Both the jury and Judge Keller rightfully rejected Sylvania's evidence. (Petition, 5 and 6; Opinion, 4a.)[1] The Circuit Court did not address the question of whether Sylvania's evidence was sufficient, as a matter of law, to establish no reasonable possibility of injury to competition, but rather determined such evidence was not relevant in light of the proof of actual harm to Von Der Ahe.

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[1] Citations to the Reporter's Transcript are designated as "RT," and trial exhibits are noted as "EX." The Circuit's published opinion is referred to as the "Opinion" and its unpublished memorandum is referred to as the "Memorandum." They will be referred to by the page number in Sylvania's Appendix, where they have been reprinted.

Sylvania did not seek a rehearing on that issue. Instead, Sylvania paints a rosy picture of competitive health which is not supported by the record, as will be demonstrated herein.[2]

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[2] Absent a determination in favor of Sylvania on this issue (no "injury to competition"), Von Der Ahe would still prevail (and Sylvania would lose) even if this Court were to determine the Question Presented favorably to Sylvania. Sylvania failed to request the Circuit to address this antecedent question in its request for rehearing, and failed to include the issue here. (The reason for these omissions will become obvious when that evidence is examined *infra*.) Therefore, a serious question is raised concerning the justicability of the Question Presented. *See* Stern and Gressman, *Supreme Court Practice* (7th ed. 1993) at 172-73, and authorities cited therein.

1. *Factual Background.*[3] Von Der Ahe became an exclusive[4] distributor of Sylvania lighting products (*i.e.*, light bulbs: fluorescent, incandescent, mercury vapor, etc., referred to in the industry as "lamps"), serving the Southern California area, in October of 1987. (EX 90.) Sylvania, North American Philips ("Philips") and General Electric ("GE") accounted for 86.5% of the lamp market.

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[3] Von Der Ahe disagrees with most factual statements made by Sylvania. Some statements are half-truths with some support in the record. Others are patently false. For example, at p. 4 Sylvania states "Von Der Ahe entered the market with virtually no business experience, a superficial acquaintance with complex lighting products, and an initial investment of $33,000." In fact, Von Der Ahe had majored in Business at USC, which he attended for four years, had prior experience working as a salesman for a lamp distributor and eventually invested over $268,000 into the business. (RT 1267; EX 10147.) Another example appears at page 4 where Sylvania states "41 firms entered the market and prospered." "Entry" was defined as having no sales of Sylvania lamps in 1988. Thus, Redlands Camera, with $1000 in sales in 1987, no sales in 1988, and $412 in 1990 was classified an entrant. Even more egregious is Sylvania's classification of Summer Electric as an entrant. Summer dropped another manufacturer's line and became a Sylvania distributor in 1991, achieving over $2,000,000 in sales. Using a different and more narrow definition there were also 22 exits. (EX 4669 pp. 120-23, 5127.) There was no evidence offered by Sylvania as to the financial health of any distributor and there is simply no basis to conclude that they "prospered." Von Der Ahe incorporates the facts as set forth in the Opinion and Memorandum rather than detail *ad nauseam* Sylvania's numerous misstatements.

[4] In its Petition at p. 4, Sylvania asserts most distributors represented multiple manufacturers. This is an incorrect statement and is not supported by the record.

(EX 4669:80-81.) Sylvania was the predominant manufacturer in Southern California with a 42.7% market share. (EX 4669:78.)

Regency Lighting ("Regency") was Von Der Ahe's main competitor. Like Von Der Ahe, Regency was a "lighting specialist;" that is, Regency specialized in lamps, and unlike the majority of other Sylvania distributors did not sell other electrical supplies. (RT 3234; 3241-2.) During the relevant time, there were only 12 lighting specialists in Southern California. (RT 2534-37.) Not all of those 12 distributors specialized in the industrial commercial market (office buildings, hotels, retail chains, etc.) as did Von Der Ahe and Regency. (EX 5124.) Sylvania gave a host of secret rebates, special credit terms and pricing deals to Regency. In 1987, the year Von Der Ahe began business, Regency's sales were $1,953,000. By 1991, as a result of price discrimination, Regency's sales swelled to $7,644,705. (EX 10337.) In the industrial/commercial segment, Regency accounted for 17.29% of total sales. (EX 5124.)

West-Lite was another lighting specialist and competitor of Von Der Ahe. It also received discriminatory pricing and secret rebates, including guaranteed profits. (EX 365.) Its sales increased sevenfold from 1989 to 1994. (EX 10337.)

Sylvania's discrimination took many forms and was much more than "simply volume discounts," as characterized in the Petition at p. 5. In fact, while Von Der Ahe and other Sylvania distributors had to purchase 11,000 cases of lamps to get the maximum volume discount of 14.5%, Regency received a 14.5% "volume discount" on

orders in excess of 15 cases. (EX 164.) Regency was also the recipient of special financing (EX 10324; 4667), loans (RT 1550-52; EX 10171), and was paid discriminatory rebates. (EX 521, 529.)

Sylvania created elaborate stratagems to conceal its discriminatory prices and lied outright to Von Der Ahe and other distributors. (RT 2744; 5505-06.) Sylvania's employees fabricated spurious and false documents to concoct non-existent price competition from competitors. (RT 2786-87, 2825, 3324-28, 3704; EX 94, 123, 137, 154, 10376.) Upon discovering these violations of the law by its employees, Sylvania did not punish them, but instead rewarded them by paying substantial bonuses. (EX 107, 200, 337.) Sylvania's conduct was so reprehensible that the jury awarded punitive damages on Von Der Ahe's tort claims. While the trial judge reduced the amount of punitive damages, he did so only after determining Von Der Ahe had met his burden of proof on each and every element entitling him to punitive damages by the "clear and convincing" standard applicable in California.

During trial, Von Der Ahe introduced substantial evidence that he lost sales and profits, and demonstrated the failure of his business was the direct result of Sylvania's price discrimination. Von Der Ahe testified to specific instances where lower prices offered by the favored distributors caused him to lose business, or forced him to reduce his price to keep the customer. Von Der Ahe's testimony was corroborated by customers. (Opinion, 4a, Memorandum, 17a; RT 2155, 2156, 1728, 1730-31, 2146-2147, 2151-2152.)

REASONS FOR DENYING THE PETITION

The Petition should be denied because the Ninth Circuit's decision is consistent with the Robinson-Patman Act, its legislative history and decades of this Court's jurisprudence; moreover, it does not conflict with the decisions of any other Circuit. Sylvania has failed to rebut any inference of injury to competition (under any definition). Finally, this Court should not extend the reasoning of its decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) to secondary-line price discrimination suits.

A. The Robinson-Patman Act Itself Dictates The Result Reached By The Lower Courts.

The Robinson-Patman Act in relevant part provides as follows:

> It shall be unlawful for any person . . . to discriminate in price . . . where the effects of such discrimination ***(1)*** may be substantially to lessen competition *or* ***(2)*** tend to create a monopoly in any line of commerce, *or* ***(3)*** *to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.* [Clayton Act, as amended by Robinson-Patman Antidiscrimination Act, 15 U.S.C. Section 13(a) (1936).] [Emphasis and boldfaced numbering added.]

The numbered items are commonly referred to collectively as the "injury to competition" element. It is obvious Congress intended this element to be achievable in three different ways ("paths"). Von Der Ahe utilized

the inference approved by this Court in *FTC v. Morton Salt*, 334 U.S. 37, 49-50 (1948) to satisfy this element via the "first path." In sum, he proved there was a substantial price difference in favor of those he competed with over time. (Memorandum, 17a-18a.) Von Der Ahe does not contend, and the Opinion of Justices Norris, Browning, and Reinhardt does not hold, that *this* inference is irrebuttable as Sylvania portrays. This Court's decision in *Falls City Indus., Inc. v. Vanco Beverage Co.*, 460 U.S. 428, 435 (1983) is controlling:

> *In the absence of direct evidence of displaced sales,*[5] this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits. [Emphasis added.]

However, Von Der Ahe did not stop after successfully invoking the *Morton Salt* inference. He also proceeded along the "third path" and established that he lost sales and profits. (Opinion, 4a, Memorandum 17a-18a.) This proof is irrebuttable (because it establishes the injury to competition element via the "third path" provided by Congress) and no Circuit examining this issue has ever held to the contrary. (Discussed *infra*.)

Sylvania ignores the "third path" and instead attacks the draftsmanship of the RPA, referring to it as the "black sheep" and a "Fifth Columnist" in the otherwise clear and well-settled law of antitrust. The argument proves too much and ignores the clear legislative history of the RPA – it *was* intended to protect competitors and not

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[5] This critical prefatory phrase is conspicuously absent from Sylvania's discussion of *Falls City*. (Petition, at p. 17.)

necessarily to be in harmony with legislation enacted two decades earlier.[6]

Sylvania makes a feeble attempt to evade the plain language of the "third path" by invoking the "canon of statutory construction" to the effect that same words in different parts of the same statute are to be given identical meanings. In essence, Sylvania asserts that "path three" adds nothing to the statute and merely complements "path one." Sylvania thus ignores the twenty-two year passage of time between enactment of the Clayton Act and its RPA amendment, as well as the rich and express legislative history to the contrary. Sylvania also turns a blind eye to the reality that words used in different contexts can have different meanings. The word "competition" in "path one" obviously can have a different connotation than the phrase "prevent competition *with*" as used in "path three."[7] Interpreting this same phrase, the First Circuit has already illustrated this point:

> That single word "with" makes a considerable practical difference. It means that the Act protects *those who compete* with a favored seller, not

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[6] It has been said, "As freak legislation, the antitrust laws stand alone. Nobody knows what it is they forbid." Isabel Paterson, *The God of the Machine*, (1943). If the RPA could speak in its own defense against Sylvania's attacks, it could validly claim to be a victim of "guilt by association."

[7] The English language abounds with words that have different meanings and connotations depending upon context. For some amusing examples visit the following web sites: http://www-personal.umich.edu/~cellis/antagonyym.html (discussing "antagonyms") and http://www-personal.umich.edu/~cellis/heteronym.html (discussing "heteronyms"). Were it not so, George Carlin would be flipping hamburgers.

> just the overall competitive process. [Emphasis in original.]

Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525, 529 (1st Cir. 1989) (Breyer, J.). To give "path three" no meaning would eviscerate the RPA and completely subvert the manifest intent of Congress.

B. The Legislative History Clearly Establishes That Robinson-Patman Was Aimed At Protecting Competitors.

Brevity forecloses an extensive review of the legislative history of the RPA here. The Circuit Court discusses it briefly in the Opinion. (Opinion, 6a-9a.) This Court also examined and extensively quoted from Senate Judiciary Committee hearings in *FTC v. Morton Salt, supra*, 334 U.S. at 49-50 (fn. 18) and concluded:

> The new provision, here controlling, was intended to justify a finding of injury to competition by a showing of "injury to the competitor victimized by the discrimination."[8]

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[8] Many courts, commentators, and attorneys have referred to this quote as the holding of *Morton Salt*. Some refer to it as the "*Morton Salt* inference." *See, e.g.*, the Petition at pages 2 and 9, and the Opinion at 13a. If this is so, then there are two *Morton Salt* inferences and holdings: the above (the "former"), and that the FTC "could infer the requisite injury to competition from proof of sales to competing buyers entailing a substantial price difference over time. *Id.* at 50." (Quoting the Petition at page 16.) (The "latter.") Since *Morton Salt* was brought by the FTC (not an injured competitor) and there does not appear to be direct evidence of lost sales or profits by any competitors, it would appear that the latter and not the former are the true holding

The Third Circuit, in *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1532-33 (3d Cir.1990), cert. denied, 499 U.S. 921 (1991), examined RPA legislative history and concluded Congress intended "to outlaw price discrimination that tends to injure competitors, rather than competition in general. . . . " (*Id.*, at 1533.) Similarly, in *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1418, n.6 (11th Cir. 1990), after summarizing a half century of RPA secondary-line jurisprudence, the Eleventh Circuit concluded: "The legal focus of the competitive injury inquiry is on the competitor, not the consumer. For section 2(a) purposes, whether or not output is restricted or prices are raised simply is not dispositive." (*Id.*, at 1418 n.6.)

Sylvania asks this Court to ignore the statutory language, the legislative history and well-established jurisprudence, and instead rewrite the RPA to make consumer harm the focus. The RPA is an antidiscrimination statute dwelling within an antitrust statute. It is much more akin to the Unfair Practice Acts enacted in many states in the same era with the objective of eliminating what were

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(note 8 continued) and/or inference. The former seems to be strong *dicta* interpreting the Robinson-Patman's injury to competition element as being established, not inferred, by proof of injury to a competitor. Which is the definitive holding and/or inference may not matter as long as care is taken to determine which proof (injury to a competitor or substantial discrimination over time) is before the court when analyzing cases, especially in attempting to determine if there is a conflict. Of course, referring to the former as an inference creates an oxymoron – "irrebuttable inference." In this Opposition the "*Morton Salt* inference" is intended to mean the latter.

perceived to be unfair business practices, to ensure fairness and a level playing field and to protect small businesses. Trying to reconcile economic theory applicable to antitrust law with such legislation is like trying to pound a square peg into a round hole.

C. There Is No Conflict Among The Courts Of Appeals.

Sylvania relies almost entirely upon *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988) to create a conflict with the Ninth Circuit Opinion and the *Feeser* and *Alan's of Atlanta* decisions.[9] (Petition, 19-21.) This reliance is misplaced. *Boise Cascade*, like *Morton Salt*, involved a situation were the Court reviewed an FTC decision finding a violation of the RPA. There was no private plaintiff. The Commission relied on the *Morton Salt* inference. *Id.* at 1128. The Commission did not rely on evidence of injury to a specific competitor in the form of displaced sales or profits.

Boise Cascade, seeking to rebut the *Morton Salt* inference, marshaled considerable industry-specific data relating to its competitors to establish those competitors had suffered no competitive harm.[10] This evidence focused

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[9] Sylvania also refers to *dicta* of other Circuits and District Courts in its extensive footnote 28, as well as an earlier decision of the Ninth Circuit in footnote 7. Since *dicta*, district court decisions and overruled decisions cannot create conflicts in the Circuits, they will not be discussed here. Suffice it to say, Von Der Ahe disagrees with Sylvania's characterization of the *dicta* and asserts these cases do not support Sylvania's position.

[10] This evidence will be described in some detail hereinbelow because it graphically illustrates by comparison the extreme weakness of Sylvania's rebuttal evidence.

entirely on the competitive health of selected competitors of Boise, not consumer injury. *Id.* at 1135.

In its opinion, the D.C. Circuit noted the FTC waived aside this evidence that competition among dealers was healthy, that selected dealers singled out for FTC examination were thriving, and that this happy picture of prosperity was apparently unclouded by instances of diverted sales. "The Commission flatly concluded that this entire body of evidence was *irrelevant*." *Id.*, at 1143-1144. [Emphasis in original.]

Boise clearly falls within the holding of *Falls City* since there was no evidence of displaced sales or lost profits by any particular competitor. The D.C. Circuit held that the FTC should have considered this evidence and reversed and remanded back to the FTC for reconsideration. Importantly, it did not hold that Boise's evidence rebutted the *Morton Salt* inference (substantial discrimination over time) as a matter of law and, indeed, upon remand the FTC determined the evidence was insufficient and upheld its earlier determination. *In re Boise Cascade Corp.*, 113 FTC 956 (1990).

Boise Cascade does not conflict with the instant case because *Boise* did not involve an injured competitor with proof of displaced sales and lost profits. The FTC relied upon the *Morton Salt* inference solely to meet the "injury to competition" element. *Boise* does not conflict with *Feeser* (injury to the competitor discussed at 909 F.2d

1535-1538), nor *Alan's of Atlanta*,[11] and neither of them attempts to distinguish the earlier *Boise* decision. It is only by confusing the *Morton Salt* inference with the "third path" that any misunderstanding can occur.

Any argument Sylvania may have that *Boise* did more than what is stated above is put to rest by the following statement of the majority at page 1163, fn. 16:

> The charge, with all respect, is quite unfounded. To the contrary, we have steadfastly adhered to traditional principles of Robinson-Patman law in concluding that the *Morton Salt* inference was properly relied upon here to establish a *prima facie* case of competitive injury. In light of the Commission's success in this respect, the burden therefore shifted to Boise to rebut the FTC's *prima facie* case by breaking, if it could, the "causal connection." Our quarrel with the Commission, and now with our colleague, is that *the FTC proceeded deliberately to ignore the wealth of evidence submitted by Boise, including fact-specific evidence going directly to the Commission-annointed "victims,"* namely the selected dealers. [Emphasis in original.]

The *Boise* court expressly refused to undergo the Sherman Act or Clayton Act analyses that Sylvania urges

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[11] In its haste to create a conflict between the Circuits, Sylvania may have overstated the holdings of *Feeser* and *Alan's of Atlanta*. Both arose in the context of the review of summary judgment motions and do not address the precise question dealt with in the Opinion. While both cases hold injury to competitors is the appropriate inquiry, the question of rebuttal is not addressed. If this is the case, Sylvania's conflict theory is even more flawed.

this Court to require in secondary-line RPA cases. *Id.* at 1163. Furthermore, by implicitly agreeing that presenting evidence of no harm to individual competitors is a proper way to rebut the inference created by discrimination over time, instead of indicating the appropriateness of Certiorari, *Boise* actually buttresses the Opinion.

D. Sylvania Has Shown No Error Committed By The Lower Courts.

Sylvania was not precluded from presenting evidence to attempt to prove that competition was not injured, nor from presenting evidence to break the causal link between its discriminatory practices and the actual injury suffered by Von Der Ahe. In fact, Sylvania's economist, Keith Ugone, spent three days testifying in a vain attempt to accomplish this. A substantial part of the testimony of Dr. Gerhard Rostvold, Von Der Ahe's economist, was devoted to rebutting the evidence put forth by Dr. Ugone.

At p. 5 of its Petition, Sylvania states: "the trial judge instructed the jury that it could infer injury to competition from proof that one of Mr. Von Der Ahe's competitors received a substantial discount." The instruction also allowed the jury to conclude the same from proof of lost sales or profits, and went *on* to state: "This inference may be overcome by evidence which you find breaks the causal relationship between a price differential and lost sales or profits."[12] (RT at 6648.)

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[12] If anything, the District Court's instruction erred in favor of Sylvania by allowing it to attempt to rebut a finding of injury to competition in the face of actual harm to Von Der Ahe.

Sylvania, in fact, *received* the instruction that it would urge this court to adopt, *i.e.*, that it could rebut a finding of harm to competition even where that finding was based upon actual proof of lost sales. Thus, even if this Court were to answer the Question Presented favorably to Sylvania, there is no reversible error.

Sylvania can only prevail if its rebuttal evidence was so strong that, as a matter of law, it overcame any inferences or presumptions (assuming it had the right to rebut). *Coastal Fuels of Puerto Rico v. Caribbean Petroleum Corp.*, 79 F.3d 182, 194, (1st Cir.), cert. denied, 117 S. Ct. 294 (1996). Sylvania argued exactly this in its post-trial motions and lost. It raised the same argument in the Circuit Court, which declined to address the question, instead holding that such rebuttal should not have been permitted in view of evidence establishing lost sales and profits. Sylvania did not ask for the issue to be addressed in its Petition for Rehearing and has not raised it in its present Petition.

This raises serious questions regarding the justicability of the Question Presented. (*See* footnote 2, *supra*.) Absent a determination that Sylvania's evidence overcame any inference, Von Der Ahe prevails no matter how the Question Presented is answered. Certainly Von Der Ahe has an interest in the Question Presented but his primary objective is recovering for *his* injury and not paving the way for future RPA plaintiffs.

(note 12 continued) (Moreover, Sylvania did not properly preserve any objection to this instruction and did not raise an objection to it on appeal.)

The Question Presented would be better deferred to a case where this Court's determination really mattered. Such cases would include the situation where the jury instruction did not allow the broad rebuttal permitted Sylvania, or where evidence was precluded, or where the lower courts have found the rebuttal evidence sufficient as a matter of law. If such a case does not arise, perhaps the issue is not that important after all.

The obvious reason that Sylvania chose not to petition for rehearing on this issue, and has not raised it here, is that it would have been virtually frivolous to do so as will be discussed next.

E. Sylvania's Evidence Was Not Sufficient To Establish The Absence Of A Reasonable Possibility Of Injury To Competition.

As Sylvania acknowledges, and as relied upon by the Circuit Court, Von Der Ahe proved his *prima facie* case using not only the *Morton Salt* inference, but also evidence of actual lost sales and profits. Assuming, for the sake of argument, Sylvania could rebut both of these showings, it would have the burden of persuading a reviewing court that its evidence so conclusively pointed to a verdict in its favor that fair-minded people could not disagree.[13] *Coastal Fuels, supra* 79 F.3d at 194.

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[13] In *Fall Cities Indus., supra* 460 U.S. at 435, the court indicated that the *Morton Salt* inference may be rebutted in the absence of direct evidence of lost sales, thereby suggesting direct evidence to a competitor may not be overcome.

Sylvania failed to carry its burden. As mentioned above, *Boise Cascade* graphically illustrates the shortcomings of Sylvania's evidence. Sylvania failed to perform anything approaching the comprehensive analysis offered by *Boise Cascade* to rebut the inference of competition. There was no evidence of the gross profit margins for any of the distributors other than Von Der Ahe, Regency and West-Lite. Both Regency and West-Lite enjoyed profit margins of approximately 30%. (EX 413 and 414). On the other hand, Von Der Ahe's gross profit margin during the last year of operations was a paltry 22%. (EX 10136.)

The *Boise* expert found a steady rise in the number of dealers in the industry, and found that all 18 of the dealers selected for analysis had enjoyed an increase in sales during the time in question, that overall annual growth was in excess of 22% and the virtual absence of lost sales traceable to the price differential. (*Id.* at 1135.)

In this case, Sylvania's expert undertook no such detailed analysis and made no such conclusions. Ugone did not differentiate between electrical distributors, lighting specialists, or lighting maintenance companies. He counted "retailers" as "distributors" and each separate outlet of the same retailer as multiple distributors. He did not define the relevant market – geographic or product. He did not analyze the impact of the pricing mechanisms on individual distributors, nor did he compare various prices given to various distributors. (RT 4421-22, 4429.) He did not interview any competitors, nor examine their financial condition. (RT 4426, 4428.) He did not conduct a study as to why customers changed distributors. (RT 4462.) He did not include discounts and rebates in his comparisons. He did not analyze lamp prices to end-

users for the period in question or afterward. (RT 4370-72.) In short, Ugone failed to conduct the kind of analysis required to overcome the causal connection between price differences and lost sales or profits.

Though not required to, Von Der Ahe's expert introduced evidence showing a substantial increase in the market share of those distributors receiving the benefits of discriminatory pricing. Large distributors (with sales in excess of $1 million) saw their market share increase from 44% in 1987 to 61.8% in 1991. (EX 10365.) This increase was at the expense of small distributors. Notably, Regency and West-Lite (the primary beneficiaries of Sylvania's discriminatory practices) accounted for 90.5% of the increase in the volume of sales for the large distributors. (EX 10366.) Other evidence suggests cooperation between Sylvania and Regency to maintain high margins. (EX 409).

Finally, although Sylvania asserts there was no injury to consumers, it failed to introduce any evidence to support this naked assertion. No Phoenix will rise from the ashes of the record Sylvania has created here, under any scrutiny imaginable.

F. *Brooke Group* Should Not Be Extended To Secondary-Line Price Discrimination Claims.

Von Der Ahe believes the reasons for not extending *Brooke Group* to secondary-line price discrimination cases have already been demonstrated. While a few commentators speculate this Court may eventually extend its reasoning in a primary-line predatory pricing case to secondary-line RPA cases, none has argued the legislative

history and well established jurisprudence support such a result.[14]

Each Circuit Court considering the issue to date has refused to extend *Brooke Group* beyond primary-line predatory pricing cases. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1446 (9th Cir. 1995) (prior to the instant case); *Coastal Fuels, supra*, 79 F.3d at 191-93 (relying on the "third path" language added by the RPA, the legislative history, and language in *Brooke* limiting its holding to primary-line predatory pricing cases.) *See also Stelwagon Manufacturing Co. v. Tarmac Roofing Systems, Inc.*, 63 F.3d 1267, 1271 (3d Cir. 1995) (applying *Morton Salt* without discussing *Brooke Group*).

Judge Eschbach, advocating judicial restraint in *Alan's of Atlanta, Inc., supra* 903 F.2d, aptly comments at p. 1418, n.6:

> For the time being we are satisfied merely to make it clear that when confronted with contemporary economic argument on the one hand and judicial precedent on the other, we feel, unlike those of a more activist bent, *see e.g. R. Bork, supra*, at 36, that economic argument is not ultimately controlling; judicial precedent is.

Kenneth L. Glazer, counsel for Liggett Group, Inc. in *Brooke Group*, has expressed the same sentiment:

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[14] Professor Calkins, in fact, found the *Brooke Group* decision "no more satisfying" than the appellate litigation preceding it. Stephen Calkins, *The October 1992 Supreme Court Term And Antitrust: More Objectivity Than Ever*, 62 Antitrust L.J. 327, 403 (1994).

> "It is fairness, as Congress perceives it, that Robinson-Patman is all about." This differing treatment is not without support of the legislative history of the two causes of action. The primary-line case existed under the original 1914 Clayton Act prohibition of price discrimination. The Robinson-Patman Act was enacted with secondary-line injury in mind.

Kenneth L. Glazer, *Predatory Pricing and Beyond: Life After Brooke Group*, 62 Antitrust L.J. 605, 632-633 (1994) (quoting, in part, from *Alan's of Atlanta* which in turn was quoting from *Boise Cascade*).

It is abundantly clear that Congress was not focusing on primary-line cases when it enacted Robinson-Patman. Congress' focus was on small businesses. It is difficult to imagine a less likely intended beneficiary of Congress' action than Brooke Group, Ltd. with its meager share (12%) of the tobacco market.

While there will no doubt be a phalanx of amicus briefs submitted in support of Sylvania's plea to rewrite the Robinson-Patman Act, Von Der Ahe respectfully submits those briefs should instead be directed to Congress and the state legislatures which have enacted unfair competition laws prohibiting the type of conduct giving rise to the district court action below.

It no doubt is costly for big business to monitor for fairness in the manner in which competitors are treated. However, substantial costs are incurred by pharmaceutical companies in obtaining FDA approval to test and market drugs. The Congress is empowered, and is in a much better position than the courts, to evaluate whether or not benefits are outweighed by costs in determining

what legislation to pass, repeal, or modify. When the courts allow personal views, economic or otherwise, to determine which laws to enforce and which to ignore, they are on a slippery slope indeed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied. Respondents request that they be awarded their costs as well as their attorneys' fees on appeal as provided for in 15 U.S.C. § 15.

Respectfully submitted,

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